

NC61EISA

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 10 (AS)

5 AVRAHAM EISENBERG,

6 Defendant.

Oral Argument

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7  
8 New York, N.Y.  
9 December 6, 2023  
2:06 p.m.

10 Before:

11 HON. ARUN SUBRAMANIAN,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the  
Southern District of New York

16 BY: THOMAS S. BURNETT, ESQ.

PETER J. DAVIS, ESQ.

17 TIAN HUANG, ESQ.

Assistant United States Attorneys

18 WAYMAKER LLP

19 Attorneys for Defendant

20 BY: BRIAN E. KLEIN, ESQ.

TALKIN, MUCCIGROSSO & ROBERTS, LLP

21 Attorneys for Defendant

22 BY: SANFORD N. TALKIN, ESQ.

NOAM B. GREENSPAN, ESQ.

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1 (Case called)

2 THE DEPUTY CLERK: Can the parties, starting with  
3 counsel for the government, please state their appearances for  
4 the record.

5 MR. BURNETT: Good afternoon, your Honor. I'm Tom  
6 Burnett for the government. I'm joined by Peter Davis and Tian  
7 Huang.

8 THE COURT: Good afternoon.

9 MR. KLEIN: Good afternoon, your Honor. Brian Klein  
10 for Mr. Eisenberg, along with my co-counsel Sam Talkin and Noam  
11 Greenspan. And our client is present.

12 THE COURT: Good afternoon. And good afternoon,  
13 Mr. Eisenberg.

14 Who is going to be doing the speaking on behalf of the  
15 government today?

16 MR. BURNETT: Largely me, your Honor.

17 THE COURT: And for Mr. Eisenberg?

18 MR. KLEIN: Me, your Honor.

19 THE COURT: Okay. So we're here for argument on the  
20 pending motion to dismiss. I'll start off by saying that as to  
21 both the motion to dismiss and the motion to suppress, the  
22 Court will deliver its decision no later than the end of next  
23 week. So I know that you've been waiting for a while, I  
24 apologize for that, but we will work expeditiously to get you  
25 decisions on both motions.

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1           So let's turn to the motion to dismiss. The Court had  
2 issued some questions or issues for the parties to address.  
3 Let's start, Mr. Burnett, with the issue of USDC as a  
4 commodity. First, just a question of what the government plans  
5 to do here. Obviously you've alleged that the MNGO perpetuals  
6 are swaps covered by the CEA. Is the government actually  
7 planning to proceed on the theory that USDC is a commodity for  
8 Counts One and Two?

9           MR. BURNETT: So I want to make sure I'm understanding  
10 the question exactly. Are you getting at the contract of sale  
11 point or whether USDC itself is a commodity?

12          THE COURT: I'm getting at just a question of what the  
13 government plans to assert here.

14          MR. BURNETT: Sure. So with respect to whether USDC  
15 is a commodity, the government certainly plans to argue that.

16          THE COURT: So then walk me through the government's  
17 theory as to how you get—let's focus on Count One. Let me  
18 take a step back. Is that as to both Count One and Count Two,  
19 meaning is the government contending that USDC is a commodity  
20 and so, for purposes of Count Two, there was a manipulative  
21 device as to the price of USDC? Or is it just as to Count One?

22          MR. BURNETT: So the fraud related to USDC is just as  
23 to Count One. Count Two focuses solely on the swap.

24          THE COURT: Perfect. Okay. So let's go to Count One.  
25 So could you walk me through how you get from USDC as the

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1 commodity, so you have a contract of sale of USDC, and then how  
2 you have a manipulative device in connection with that contract  
3 of sale of USDC, given the allegations of the indictment that  
4 focus on the manipulation of the MNGO perpetuals. So that's  
5 the kind of question that I have, and I'm hoping that you can  
6 help me with that.

7 MR. BURNETT: Sure, your Honor. First, just  
8 logistically, do you mind if I go over there or just sit, just  
9 so I'm not like hunched over?

10 THE COURT: Whatever is more convenient for you. I'm  
11 happy for you to sit; I'm happy for you to use the lectern, if  
12 it's more convenient.

13 MR. BURNETT: Okay. I'm happy to just use the  
14 lectern.

15 THE COURT: Perfect.

16 MR. BURNETT: So before I get directly to the question  
17 you asked, I want to make sure I'm clear about something on  
18 framing, just for procedural purposes.

19 As the Court is aware, in connection with criminal  
20 indictments, the government doesn't need to lay out its theory  
21 of how it plans to meet all the elements of a crime, and for  
22 purposes of evaluating a motion to dismiss, there's a  
23 difference between when the government is representing that  
24 it's making a full proffer of its facts versus not making a  
25 full proffer of its facts, and at this stage the government is

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1 not taking the position that it has and is laying out all the  
2 facts that support the charge in the case here, which I just  
3 want to make sure I'm putting on the record for purposes of  
4 analyzing the motion to dismiss.

5 THE COURT: I understand that. But you would agree  
6 that under cases like *Pirro*, if something that's in the  
7 indictment simply isn't a crime, then that is something that  
8 the Court can consider on a motion to dismiss, correct?

9 MR. BURNETT: So if it is the case that the government  
10 has committed that what it has laid out in the indictment is  
11 the full extent of its proof here, I think there's a difference  
12 between the speaking portion of the allegation and the portion  
13 of the indictment that outlines or identifies the statutory  
14 language. Our position is that if we've tracked the statutory  
15 language, the rest of the indictment gives some notice to the  
16 public and to the defendant about what the crime is but is not  
17 a full statement of the government's proof or legal theories.

18 THE COURT: So how do you square that with cases like  
19 *Pirro*, where the court didn't just look to see whether the  
20 elements of the statute were alleged in the way that you're  
21 suggesting, but actually performed an inquiry to determine  
22 whether there was a crime, given the law and the case law—on  
23 the tax issue it was in that case—and a majority of the court  
24 said that because the facts as alleged did not constitute a  
25 crime in the view of the majority, then that portion of the

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1 complaint, at least, would be dismissed?

2 MR. BURNETT: So my understanding is that there, there  
3 was more of a commitment from the government in terms of, what  
4 you're reading in the indictment here is the full statement of  
5 the crime, and that's the reason the court was able to proceed  
6 on those grounds, and under those circumstances, it's  
7 appropriate to do so.

8 THE COURT: Okay. So that's the difference between  
9 *Pirro* and cases like *Dawkins* and *Wedd* that indicate that where  
10 the question is really is whether facts could be put forward at  
11 trial that would constitute a crime, that's not really an  
12 inquiry that the Court engages in on a motion to dismiss.

13 MR. BURNETT: Right. And so you know the reason it's  
14 set up that way is because the government can appeal from a  
15 grant of a motion to dismiss, but whether it can appeal from a  
16 Rule 29 decision depends on a number of other factors. So  
17 basically it's set up to allow the government to commit early  
18 on that this is the full statement of what we're trying to  
19 prove here, so if the Court dismisses the case on those  
20 grounds, the government can appeal directly, whereas it may not  
21 have that opportunity to do so otherwise. So it's not really  
22 analogous to, like, civil motions to dismiss or summary  
23 judgment, where it's either party can kind of raise something  
24 in the same way.

25 THE COURT: Well, the language of the criminal

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1 provisions that are at issue and the language in the analogous  
2 civil rules, the language is very similar, and so the approach  
3 that—I understand what you're saying about the appellate  
4 rights and it's a different context, but it seems that the law  
5 in the criminal context is almost like the pre-*Twombly* standard  
6 of, well, if the government can succeed on any set of facts,  
7 then it's permitted to move forward, whereas in the civil  
8 context, obviously there is a plausibility or a sufficiency  
9 analysis that is done at the pleading stage. But I understand  
10 your point, I understand the argument, and I understand the  
11 authorities in this area. So with that, maybe you can help me  
12 out a little bit on the USDC question.

13 MR. BURNETT: Of course, your Honor. So why don't I  
14 start with why this is a contract of sale for a commodity, and  
15 then I'll go from there to why the fraud is in connection with  
16 the contract of sale. So the first question—

17 THE COURT: I understand that USDC satisfies the  
18 definition of commodity, at least in the government's  
19 perspective, because there's an existing futures market for  
20 USDC, and then obviously there are allegations in the  
21 indictment about a sale of USDC in exchange for MNGO. So  
22 tracking the language of the CEA and the language of the  
23 indictment, you have not only alleged the elements of the  
24 statute but you've explained how the facts map onto those  
25 elements. So I'm with you till then. And I'm going to turn to

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1 the defense and get their perspective, but I'm with you up to  
2 that point. So maybe you can take me from there.

3 MR. BURNETT: Sure. And I think the first question  
4 you had put in the order was whether USDC—whether these are  
5 contracts of sale, and I think our position is they are  
6 contracts of sale, and the reason primarily is the plain text  
7 of the statute. The statute defines a contract of sale as any  
8 sale, agreement of sale, or agreement to sell; and the  
9 regulatory language interprets that as sales, purchases,  
10 agreements of sale, or purchases and agreements to sell and  
11 purchase. So I think selling USDC for MNGO is a heartland in  
12 the textual definition of what a contract of sale of a  
13 commodity is. There's a point that the defense raises that,  
14 well, here, USDC is used as a medium of exchange, as opposed to  
15 some other thing. I think there are a few issues with that  
16 argument.

17 First, there's no carveout from the definition of  
18 "contract of sale" in the CEA for what the purpose is that the  
19 commodity is being used, i.e., whether it's being used as a  
20 medium of exchange or not being used as a medium of exchange.  
21 So we don't think there's a reason to add that textual  
22 limitation on the contract of sale language.

23 And the second thing, which I think is the statutory  
24 context that helps the Court understand that point, relates to  
25 some important carveouts that are in the text of the CEA. So



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1 Section 2 of the CEA, which relates to the jurisdiction of the  
2 CFTC and also the reach of the CEA, has extensive and very  
3 detailed carveouts for different types of foreign currency  
4 transactions, including foreign currency spot transactions,  
5 foreign currency swaps, foreign currency options. And the  
6 reason that the statutory scheme needs to have all those  
7 carveouts for foreign currencies is because foreign currencies  
8 otherwise do fall in the definition of "commodity" and would be  
9 subject to the same contract of sale that—

10 THE COURT: Could I have the citation for that again.

11 MR. BURNETT: 7 U.S.C. Section 2 is the portion of the  
12 statute that is about the jurisdiction. In terms of the  
13 carveout specifically, I do have it here. Just a moment.

14 Yeah, so it's primarily in 7 U.S.C. 2(c)(1)(A).

15 THE COURT: Got it. So if I'm understanding you, if  
16 there was this carveout for mediums of exchange, then you  
17 wouldn't need these explicit carveouts for things like foreign  
18 currency, spot transactions, because currency is a medium of  
19 exchange, and yet Congress saw fit to have explicit carveouts  
20 for those because they would otherwise fall within the  
21 definition of "commodity."

22 MR. BURNETT: That's exactly right. And to put even  
23 just a little bit of pressure on the medium of exchange concept  
24 shows that it easily falls apart. So imagine that the  
25 transactions here had been buying MNGO with Bitcoin instead of

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1 buying MNGO with USDC. There are people who use Bitcoin as a  
2 medium of exchange. That's a main function that it's pitched  
3 as being able to serve as. But this medium of exchange test  
4 would require you to kind of analyze, on a case-by-case basis,  
5 whether the person in this situation is using it as a medium of  
6 exchange versus as a way to hedge a Bitcoin risk or a gain or  
7 lose exposure to Bitcoin, which there's nothing in the statute  
8 that would justify that intent-based definition of "contract of  
9 sale," as opposed to just, is a commodity involved in this  
10 contract of sale.

11 THE COURT: I understand that. Perhaps the stronger  
12 version of the argument is, let's assume that you're right. So  
13 you have a contract of sale of USDC, but where the medium of  
14 exchange point really factors in is the "in connection with"  
15 requirement, meaning the manipulative device has to be in  
16 connection with the contract of sale of USDC. And so when you  
17 kind of read all that text together, it seems like you have to  
18 have manipulation as to USDC, which is not at least alleged in  
19 the indictment. Whether that's grounds for dismissal or not,  
20 it's not the gravamen of the indictment, since the indictment  
21 is focused on the manipulation of the MNGO perpetuals.

22 MR. BURNETT: So I certainly agree that the heart of  
23 the indictment is about the perpetuals, and we can get to that  
24 later. But I do think that the case, that the indictment also  
25 makes out manipulation in connection with these contracts of

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1 sale.

2 THE COURT: Of USDC.

3 MR. BURNETT: Of USDC. Because—so it's not  
4 manipulating the price of USDC in the sense of manipulating the  
5 price of USDC relative to the dollar. So we're not making the  
6 argument that these trades were causing the USDC to depeg in  
7 some way. Rather, what it's doing is it's—I think what's  
8 important here is this is not like using USDC to, like, buy a  
9 potato or, like, buy a taco truck. The way the  
10 cryptocurrencies trade is very similar to the way that foreign  
11 exchange trading is done, in the sense that they trade as  
12 pairs, and so their value is really the pair relative to one  
13 another.

14 And to kind of illustrate the point here, it is  
15 certainly the case that the trading here caused the MNGO, the  
16 value of MNGO relative to USDC to change substantially.  
17 Because the trading happens so quickly, I'm actually not even  
18 sure if it changed the value of MNGO relative to, say, Bitcoin  
19 or the dollar or to other assets that it might trade in.

20 So I think it's wrong to think about this in terms of  
21 just, did it change the value of USDC. To change the value of  
22 USDC relative to what? And here, there was manipulation of the  
23 MNGO USDC market, which caused the relative value of those two  
24 currencies to change dramatically. And the contracts of sale,  
25 the sales of USDC for MNGO, was how that happened. This was

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1 directly in a USDC market where the manipulation occurred, and  
2 that's why the manipulation was in connection with USDC, even  
3 though the ultimate end goal was to manipulate the price of the  
4 swap to get money from investors on the Mango Markets platform.  
5 And I think to kind of illustrate—

6 THE COURT: Am I correct that both the contracts of  
7 sale, meaning the trades, the sales of USDC for MNGO and then  
8 the MNGO perpetuals themselves, they both implicate the pair  
9 that you're referring to, meaning the USDC-MNGO pair. So  
10 whether you look at it in terms of the swap or whether you look  
11 at it in terms of the contract of sale of USDC, you're talking  
12 about the same pair of instruments, either securities or  
13 commodities or however it's defined.

14 MR. BURNETT: So that's right, with one caveat that I  
15 actually think is important to this foreign exchange analogy  
16 that I was making earlier. So not only does the USDC-MNGO pair  
17 kind of trade as its own value pairing; it trades as its own  
18 value pairing differently on different platforms. So basically  
19 what happened here is there were three platforms that were  
20 relevant to the trading, and the defendant's trading caused the  
21 relative value of MNGO and USDC to change to different extents  
22 on each of those platforms, and Mango Markets basically had a  
23 software program that took, looked at that trading—

24 THE COURT: This is before—

25 MR. BURNETT: Yeah—and drew from that. So there is

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1 actually a difference between the USDC-MNGO measure that you're  
2 seeing on Mango Markets as opposed to the values, but I think  
3 this actually goes to show why this is manipulation in  
4 connection with USDC as well, because on all these separate  
5 platforms, there's separate changes to this relative value of  
6 USDC-MNGO that are independent of the way the swap value is  
7 changing and independent of the way that value is changing on  
8 the other platforms as well.

9 THE COURT: Okay. So your position is because you  
10 have this pair and that pair is what was involved in the  
11 contract of sale of USDC, that's how you get from "in  
12 connection with" to "contract of sale" to the underlying  
13 commodity, since USDC, the only way it could be really carved  
14 out would be if there was any credence to the medium of  
15 exchange concept. You say there isn't any basis for it in the  
16 statute, and there are explicit carveouts for certain other  
17 mediums of exchange, and so this wasn't one of the explicit  
18 carveouts that Congress put in place.

19 MR. BURNETT: Not only that. I think it would do some  
20 serious damage to the way CFTC has regulated in this area or  
21 given guidance in this area to do a medium of exchange  
22 carveout. So there's one regulatory guidance piece that we  
23 cited in our briefing which relates—the CFTC guidance related  
24 to retail commodity transactions, which really aren't relevant  
25 here, but what is important is in that guidance, the way the

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1 CFTC identifies which cryptocurrencies are commodities, it's  
2 really by looking at which cryptocurrencies are used as mediums  
3 of exchange versus other cryptocurrencies, which kind of have  
4 different purposes. So in fact, the way the CFTC has  
5 identified the universe of cryptocurrencies that are  
6 commodities is by looking at which ones are used as mediums of  
7 exchange. It would do some serious damage to the way they've  
8 approached that issue to say medium of exchange is carved out  
9 entirely.

10 THE COURT: Okay. So you've covered "in connection  
11 with," "contract of sale," and USDC as a commodity. So I'm  
12 going to take you one step backward to "manipulative device."

13 So if I'm conceiving of it in this way—and you've  
14 made clear that the swaps market is different, it's on a  
15 different platform, there's a different analysis there. So if  
16 we're just focusing on the USDC-MNGO transactions, then how was  
17 there any price artificiality or manipulative device as to  
18 those trades, given that they were open-market USDC sales for  
19 MNGO?

20 MR. BURNETT: And that goes to the Second Circuit case  
21 law in the securities context primarily, but it's also been  
22 applied in the commodities context, which is that open-market  
23 trades that are designed to move a price can be manipulative  
24 and fraudulently manipulative and can create an artificial  
25 price when what is determining the price is really the

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1 intentional rigging by the trader as opposed to the natural  
2 interplay of supply and demand.

3 THE COURT: It was literally just Mr. Eisenberg's  
4 intent when he was engaging in those sales?

5 MR. BURNETT: Yes. And the Second Circuit has  
6 explicitly held that sometimes intent is all that—the  
7 difference between lawful trading and nonlawful trading in the  
8 context of open-market manipulation. That was most recently  
9 the *Vali Management* case, which affirmed a jury instruction  
10 from Judge Cote in *LEK Securities* that said that explicitly.  
11 And Judge Liman in the *Phillips* case—which happened just a  
12 couple weeks ago—gave a similar instruction.

13 THE COURT: Okay. So is there any other conduct other  
14 than the allegation and Mr. Eisenberg's intent that would  
15 support a finding of there being a manipulative device or a  
16 price artificiality just with respect to the USDC-MNGO trades?

17 MR. BURNETT: So this also gets into some of the  
18 points we made about the secretive way in which Mr. Eisenberg  
19 got on to those platforms. So with respect to one of the  
20 platforms, Mr. Eisenberg used someone else's identity to get on  
21 to the platform and did the trading under that different  
22 person's identity. With respect to another platform he used—

23 THE COURT: VPN, and came in through pull-in, I think.  
24 That's not in the indictment, but—

25 MR. BURNETT: Yeah, that's right. There was actually

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1 like literally a passport photo of a Ukrainian woman that was  
2 used to register the account. So it wasn't just a VPN alone;  
3 it was also this fake identity.

4 THE COURT: Okay. I understand that on USDC.

5 So that takes us to MNGO perpetuals as the swaps. And  
6 so obviously in the order that the Court issued, we cited to  
7 language from the government's brief in *Phillips*, where it  
8 discussed the "in connection with" requirement. And I  
9 understand that *Phillips* was a different situation, where the  
10 real question was whether you could have manipulative conduct  
11 on an unregulated market that then has an impact in a regulated  
12 market, so it's a different factual context. That being said,  
13 the government did characterize the "in connection with"  
14 requirement in a way that does not seem to map very clearly  
15 onto what happened in this case. So I'm hoping you can help me  
16 with that.

17 MR. BURNETT: So to the extent that's the way it read,  
18 I was part of the trial team for *Phillips* and—

19 THE COURT: You wrote it. You wrote that language.

20 MR. BURNETT: —that was not the intent of the way we  
21 wrote. As you pointed out, there was a concern that  
22 Judge Liman had expressed at different points during the case  
23 that basically there is clear—this actually goes to the point  
24 I was making earlier about foreign exchange. There are clear  
25 laws that carve out spot foreign exchange trading from certain



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1 types of CFTC regulation, and what Judge Liman was expressing a  
2 concern about was that we would, either in that case or down  
3 the road, basically charge spot manipulation cases and say,  
4 well, there are, like, swaps that are based on this. Those  
5 swaps aren't really important to, like, the case, they don't  
6 matter to anyone involved, but, like, they're swaps so we can  
7 charge it. And the sentence was meant to emphasize that this  
8 is not that—that *Phillips*, sorry, not this—the *Phillips* case  
9 was not that type of scenario. There, the spot market  
10 manipulation was done specifically to manipulate a swap, that  
11 that was the goal, and the whole point of the manipulation was  
12 to defraud the parties to that swap. What we weren't trying to  
13 do in that language was define the entire universe of "in  
14 connection with," and the definition of—

15 THE COURT: Okay. So do you have a case for me?  
16 Because if we look back, the best authority you probably have  
17 for how "in connection with" should be construed is from some  
18 of the pronouncements of the CFTC in connection with the  
19 promulgation of Section 180.1, in which they indicate that if  
20 there is impact to the market, then that would be within the  
21 broad scope of what the Commission thought should fall under  
22 "in connection with." But if you look at the securities cases  
23 that are often looked to as analogies—like *Chadbourne & Parke*  
24 and some other cases—they're usually in the context of the  
25 manipulation having to do with counterparties to the

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1 transaction; really, you're trying to deceive someone who is in  
2 one of these transactions in which the manipulation is  
3 occurring. And obviously we don't have that here because  
4 Mr. Eisenberg is on both sides of the swap transaction. So  
5 help me out with that, if you have a case or some authority  
6 that would show that it has a broader scope than just that.

7 MR. BURNETT: Absolutely. And if you don't mind, or  
8 bear with me, I think there's a little bit of stepping back,  
9 because there are a lot of cases that I think go to this point.

10 But first, before we do that, I want to just kind of  
11 hit on the kind of basic factual theory of what we're working  
12 with here, because that will help understand, or help kind of  
13 guide the analysis of the case law.

14 What's important here is while it is true that  
15 Mr. Eisenberg was on both sides of the swap, there wasn't like  
16 some investor on the other side of the swap, the Mango Markets  
17 platform, and, by extension, the Mango Markets investors, were  
18 taking on Mr. Eisenberg's swap position as collateral for a  
19 loan. So the way that the platform works is basically that  
20 you're allowed, as a user of Mango Markets, to borrow against  
21 the value of assets that you have, including swap positions  
22 that you have. And the extent of your borrowing is dictated by  
23 the size of your positions. And when you do that, you're  
24 putting up your positions as collateral for the loans that  
25 you're getting. And the way it works is if you don't have

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1 enough collateral, at some point you get liquidated, which  
2 means a liquidator comes in, takes that position, and tries to  
3 sell it off to recoup as much as it can of the value of the  
4 asset, which is very, very similar, basically the same—

5 THE COURT: No, I get that. The problem I have there  
6 is that at that point, right, you're outside of the swap market  
7 or the commodity market, unless you're conceiving of the  
8 ultimate transaction, when Mr. Eisenberg is alleged to have  
9 borrowed and withdrawn cryptocurrency, based on his holding in  
10 the MNGO perpetual, as almost being a sale back to Mango  
11 Markets of the MNGO perpetual in exchange for the crypto that  
12 he then takes. So then you can kind of conceive of Mango  
13 Markets as being a party in the swaps market. They're taking  
14 on his position in the swap in exchange for lending him this  
15 cryptocurrency. But, you know, the actual transaction is  
16 outside of the actual swap market. They're not a counterparty  
17 to the swap; he's not selling a swap; he's not doing anything  
18 in the swap market itself.

19 MR. BURNETT: So I disagree. I think both practically  
20 and with the securities case law, that's not the way it works  
21 out.

22 So practically, one way to think about this is like,  
23 imagine if you had a statute that said fraud in connection with  
24 housing is prohibited. What that analysis basically is saying  
25 is that if someone were to fraudulently inflate the value of

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1 their house to get a massive home mortgage loan, that's not  
2 fraud in connection with housing because the bank is taking the  
3 house as collateral but is not actually buying it. The  
4 "purchase and sale" language that you're focusing on, or this  
5 need for there to be some kind of sale, is not in the swap part  
6 of the Commodities Exchange Act. It is in the 10b-5 context,  
7 but it's not in the Commodities—

8 THE COURT: Yeah, the purchase and sale, that  
9 restricts the "in connection with" language in the securities  
10 context in a sort of different way, because what I'm saying  
11 here is that, I give you that if there is a manipulative device  
12 in connection with the swap, in any point in the swap  
13 transaction, that would count under the CEA, while it might not  
14 work in the securities context because of the buy and sell, the  
15 "purchase and sale" language. But what I'm saying here is that  
16 the actual transaction with Mango Markets occurs not in the  
17 context of the swap transaction itself; it's just that the swap  
18 functions as collateral for the borrowing that Mr. Eisenberg  
19 does subsequent to the alleged manipulative conduct, right?

20 MR. BURNETT: So it doesn't occur in connection with  
21 the creation of the swap, but it occurs in connection with the  
22 pendency of the swap and the use of that swap as collateral.  
23 And the reason that's important is, if you look to the  
24 regulatory language on this, the CFTC was actually very clear  
25 that pendency of the swap was one of the things it was focused

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1 on.

2 But I think to kind of go back to the securities  
3 context for a minute, there's actually a really useful Supreme  
4 Court case, and I think it's helpful to think about this, and  
5 it's—if I can just pull it up here.

6 It is the *Rubin* case.

7 THE COURT: And do you have a cite?

8 MR. BURNETT: Yeah. It's 449 U.S. 424. So that's a  
9 '33 Act case, so it's not a 10b-5 case.

10 THE COURT: Give me that citation again?

11 MR. BURNETT: Sorry. It's 449 U.S. 424.

12 THE COURT: Okay.

13 MR. BURNETT: And so that was a '33 Act case, but it's  
14 been applied both by the Supreme Court and the Second Circuit  
15 to the '34 Act/10b-5 context.

16 So the facts of that case were very similar in a lot  
17 of ways to the facts we have here. In that case, the defendant  
18 had used and misrepresented the value of securities that he was  
19 pledging to secure a loan. And the question before the court  
20 in that case was whether that pledge of securities was in an  
21 offer or sale of a security. And the Supreme Court held, yes,  
22 it is in an offer or sale of a security because by pledging  
23 this as collateral, you're effectively giving a contingent  
24 future possessory interest to the other side in that property.  
25 And that language "in the offer or sale" from the '33 Act is

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1 textually narrower than the "in connection with" language. And  
2 the Supreme Court has recognized that, in *Marine Bank v.*  
3 *Weaver*, which is 455 U.S. 551, footnote 2, the court explicitly  
4 recognizes that this idea that a pledge of security for a loan  
5 is the same thing as an offer or sale of a security applies to  
6 the 10b-5 context. The Second Circuit has also recognized that  
7 in *Chemical Bank v. Arthur Andersen*, which is 726 F.2d 930.  
8 Now there, the court found that the pledge was not "in  
9 connection with" for factual reasons but adopted this basic  
10 premise from *Rubin*.

11 So I think this *Rubin* line of cases is important for  
12 two different reasons. First, it would be I think anomalous to  
13 interpret the Commodities Exchange Act, which does not have  
14 this "purchase or sale" requirement, as narrower than 10b-5,  
15 which has this "purchase or sale," which is an additional  
16 limitation on the "in connection with" requirement. That's the  
17 first part.

18 And then second, I'd urge you to read kind of the  
19 rationale of the court in *Rubin*, because the court does a good  
20 job there I think of explaining why, for antifraud purposes and  
21 the policies behind the antifraud laws, it doesn't make any  
22 sense to treat an investor in a security differently than  
23 someone who's taking that security on as collateral for a loan,  
24 because in both cases they're relying on the counterparty to be  
25 truthful about the value of that, the expected future value of

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1 that, and they're in the same type of alliance position. And I  
2 think that goes back to this housing analogy that I was making  
3 earlier, which, if you have "in connection with" a house  
4 instead of "in connection with" a swap, there's no reason to  
5 limit that with just a purchase or sale of a house as opposed  
6 to do with anything to do with the ownership of the house,  
7 including using that house as collateral for a loan.

8 So I think what this shows is Mango Markets and Mango  
9 Markets investors very much are in the swaps market. They're  
10 not necessarily, for this transaction, involved in the swap  
11 itself, but they're beholden to the value of the swaps market  
12 because they're taking Mr. Eisenberg's swap position on as  
13 collateral for their loans.

14 So I think there are kind of other cases that make the  
15 same point. I think there's a line in *In re American*  
16 *Continental*, which is a Ninth Circuit case, 49 F.3d 541, which  
17 is: A pledge of securities to secure a margin brokerage  
18 account constitutes a purchase or sale. And I think there's  
19 actually one kind of recent S.D.N.Y. case before Judge Abrams  
20 that helps illustrate this point a little bit. So it's *U.S. v.*  
21 *Hild*. The relevant case citation is 644 F.Supp.3d 7. But the  
22 case citation isn't as important as the basic facts. And the  
23 idea in that case was, you had a defendant who ran a company  
24 that basically bundled different types of loans and mortgages  
25 into portfolios. And those in the case were the security,

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1 those portfolios. And what the defendant did was  
2 misrepresented the value of those securities to go out and get  
3 loans from borrowers that it needed to keep things going. And  
4 in that case, it was a repo loan, so technically there was a  
5 purchase or sale because the borrower was, like, briefly taking  
6 on the portfolio. But it makes no sense as a matter of text or  
7 policy to treat like a repo loan differently from a collateral  
8 loan in these contexts. In both situations, you're beholden on  
9 the persons making the representation to honestly represent the  
10 value of the thing that they have.

11 So I think that kind of is the set of case law that  
12 most directly addresses the Court's question. There's a  
13 broader set of case law also that I think is very clear that  
14 the fraud does not need to be directed or aimed at an investor  
15 in order to meet these standards. These are also from the  
16 securities context largely, but if you'll bear with me, I'll go  
17 through a couple, just because I think they're useful for the  
18 legal point.

19 THE COURT: Sure.

20 MR. BURNETT: So the first kind of bucket of cases are  
21 the misappropriation theory of insider trading cases. So in  
22 those situations, the victim of the fraud is not purchasers or  
23 sellers of a security; the victim is the corporate entity  
24 usually that had their information misappropriated. So the  
25 fraud is not directed at investors; the fraud is directed at



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1 the company. But the fact that the proceeds of that  
2 fraud—basically the fraudulently obtained information—is used  
3 to purchase a security has been sufficient to satisfy the "in  
4 connection with" requirement. And like the Supreme Court in  
5 *O'Hagan* was clear that Section 10(b) does not confine its  
6 coverage to deception of a purchaser or seller of securities.  
7 There's kind of a separate line of cases, the most recent of  
8 which is *U.S. v Khalupsky* in the Second Circuit, 5 F.4th 279.  
9 And that's a case where what happened was a trader basically  
10 worked with a team of hackers to hack into news sources to get  
11 information that they then used for trading. So it's another  
12 situation where the fraud was on those victims of the hacking,  
13 not on anyone who was in the market for those securities. But  
14 the Second Circuit also held that that satisfied the "in  
15 connection with" requirement. And the relevant quote is: "The  
16 defendant's assertion that the deception must have targeted  
17 investors contradicts the plain language of 10b-5. The  
18 deception need be only in connection with the purchase or sale  
19 of any security." So that's kind of one set of cases.

20 Another set of cases are these fraud on the broker  
21 cases. So I think the kind of clearest one here is a Garland  
22 opinion from the DC Circuit, which was *Graham v. SEC*. That's  
23 222 F.3d 994. And it's a little bit of a complicated fact  
24 pattern, but the basic gist of it is that the defendant there  
25 had brokerage accounts at a bunch of different brokers and

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1 owned like basically one batch of securities, but he was  
2 running short on cash. So what he'd do is he'd sell the  
3 securities from himself at one brokerage account to his own  
4 brokerage account at a different broker, at an inflated price,  
5 and because of the rules about the timing on which he could  
6 take out a loan using the proceeds of the sale as margin versus  
7 what he actually needed to, like, cover for the sale he just  
8 made allowed him to get basically a bunch of loans from his  
9 brokers using these sales to himself, that were not real sales,  
10 to fund the transactions. That was held to be in connection  
11 with the purchase or sale of a security, even though there,  
12 it's clearly no fraud on the investor. He was the investor.  
13 It's fraud on the broker. And it's actually pretty much on all  
14 fours with this case here in the sense that it's  
15 misrepresenting the collateral to get out a loan from another  
16 entity. In that case it was a broker; and here, the folks on  
17 Mango Markets.

18 THE COURT: And there's no reliance or injury  
19 requirement here, right? So it's really a question of  
20 just—the government, in its brief in *Phillips*, said  
21 "material." And is that the right way to think of the "in  
22 connection with" requirement, meaning, who would the  
23 manipulative device have been material to, whether it's a party  
24 to the transaction, a broker, some of the other examples that  
25 you're giving? How do you conceive of it in this context where

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1 you don't have, as you would in the civil context, a plaintiff  
2 saying that they were the targets of the manipulative device  
3 and were injured as a result of it?

4 MR. BURNETT: I actually think it's just the standard  
5 instruction on "in connection with," which was just, did this  
6 coincide with or was it a necessary aspect to the scheme. The  
7 material point is something we can address and will, assuming  
8 this case goes to trial, in connection with jury instructions.  
9 I think the government's position is that materiality is  
10 something you need to prove in misstatement cases but not in  
11 price manipulation cases. But that is I think something that's  
12 certainly not a motion to dismiss type issue. It was heavily  
13 litigated before Judge Liman later on in the case.

14 THE COURT: Okay. And did these questions solely  
15 arise with respect to Count One? Do they come up in the  
16 context of Count Two in another form? Count Two doesn't have  
17 the "in connection with" language, but is there some other way  
18 that there is some balance on Count Two, the language there?

19 MR. BURNETT: So I think—they don't apply to Count  
20 Two, and I think the way to think about the difference between  
21 Count One and Count Two is that Count One is a fraud charge,  
22 Count Two is not a fraud charge.

23 So for Count One, Count One basically recognizes—or  
24 the CEA and the Dodd-Frank Act that lead to Count One basically  
25 recognize that fraud can be manipulative because it can be used

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1 in—or manipulation can be fraud because it can be used in a  
2 deceptive way. So that's why, when the government needs to  
3 prove its case with respect to Count One, it has to satisfy not  
4 only the "in connection with" element but also these elements  
5 about "scheme to defraud," "specific intent to defraud," that  
6 sort of thing. Those elements are not present with respect to  
7 Count Two, and that's because Count Two has a bit of a  
8 different genesis. Count Two is a much older statute that  
9 dealt with—I think the way to think about it, really, is it's  
10 almost more of an antitrust statute, which is basically using  
11 market power to manipulate swaps or manipulate certain  
12 contracts related to commodities is per se criminal without  
13 regard to whether it's fraudulent or not. And to kind of think  
14 about the difference, you can imagine a situation—the way we  
15 like to think about it is kind of like old-timey market  
16 cornering. So if someone—let's think back to, like, Ulysses  
17 S. Grant era—like, had a corner on the market for gold, which  
18 is a thing that happened back then, Count Two would prohibit  
19 that person from using the market power to corner the gold  
20 futures market and manipulate the price of gold options. Even  
21 if they were going out on Wall Street and yelling, "I'm doing  
22 this, I have market power, you all have to pay me whatever I  
23 want," because that would be manipulation, that would not be  
24 fraud because it would be totally forthright, he'd be  
25 announcing what he was doing, it would be very public to

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1 anyone, so it would not be actionable under Count One, because  
2 it would be fully disclosed. But it would apply under Count  
3 Two. And I think the difference—why one has a fraud origin  
4 and the other doesn't have a fraud origin—goes to kind of, who  
5 is it aimed at, who is it deceiving, that kind of thing,  
6 doesn't really make sense, because what matters is the object  
7 of Count Two is the swap, is manipulating the price of the  
8 swap. That's it. And he needed specific intent to create an  
9 artificial price, which is kind of the trick for Count Two that  
10 does not apply to Count One, but—or at least not explicitly,  
11 because he needs to both have achieved and specifically  
12 intended the artificial price. So there's kind of more going  
13 on that are separate elements in Count Two that don't appear in  
14 Count One, but not the ones that the Court has been focused on.

15 THE COURT: Okay. And then same question on the  
16 manipulative device and price artificiality as to the swap  
17 transaction. Putting aside any conduct in the separate market  
18 for the contracts of sale of USDC that we previously discussed,  
19 the additional deceptive conduct, in the government's view,  
20 would be either the failure of Mr. Eisenberg to disclose that  
21 he had no intent to repay the loan—is there anything else with  
22 regard to the swap that the government would say constitutes  
23 deceptive conduct? I understand your intent point.

24 MR. BURNETT: Yeah. So it goes to the borrow broadly.  
25 It's not only not expressing intent not to repay but not to pay

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1 interest, and not to—and that, like, the value of the thing  
2 you're taking a loan out against is fraudulently inflated.

3 THE COURT: Okay. And how do you respond to  
4 Mr. Eisenberg's argument that the protocols just weren't set up  
5 in that way, that it's not a conventional contract where you  
6 sign on the dotted line and agree to repay with interest and  
7 everything the government contends, the protocols just allow  
8 you to borrow and withdraw, that's what it allows you to do, so  
9 there's nothing that was not permitted by the Mango Markets  
10 protocols that Mr. Eisenberg did.

11 MR. BURNETT: So I think the answer there is that you  
12 are still—it's called a smart contract for a reason. You are  
13 still agreeing to do this. It's self-executing in the sense  
14 that the code automatically will take the interest payments  
15 from you if it's there, but you're still making this  
16 representation that you're doing a borrow and that—and you're  
17 signing up for interest to be drawn down from your account. I  
18 think the cases that we cited in the wire fraud context are the  
19 ones that are most on point here. There are a couple. I think  
20 the first one—and I don't have the citations as handy, but  
21 they're in our brief. So, *Durland*. So *Durland* was the older  
22 Supreme Court case where there was a—basically someone issued  
23 a bond with no intent to actually make the scheduled coupon  
24 payments that were on the bond. And the Supreme Court held  
25 that, well, that's fraud because you made—you incurred the

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1 obligation with no intent to carry it out, at the outset of the  
2 time you made that obligation. So the fact that it was public,  
3 that everyone could see the bond or that there were other  
4 contractual remedies people could have pursued to kind of get  
5 back the bond payments didn't change the fundamental point that  
6 it was still a fraudulent representation. And the *Countrywide*  
7 case recognized that that's still good law in the Second  
8 Circuit, albeit on the facts of *Countrywide*, it didn't apply.  
9 I think the other cases are these spoofing cases in the Second  
10 Circuit—or, sorry—the Seventh Circuit we cited, which were  
11 *Chanu* and *Coscia*, and there, basically the fraud was putting in  
12 buy or sell orders into order books for commodities with the  
13 intent to pull those buy and sell orders before someone  
14 actually hit them. And the idea there is that you're very  
15 publicly putting out this representation, I'm here to buy, I'm  
16 here to buy, and if someone hit that bid, you would be  
17 obligated to buy and go through with it, but what makes it  
18 deceptive is you're putting out that representation; you're  
19 saying, I'm willing to take on this obligation, when you  
20 secretly have no intent to do so. So it's the expressing  
21 willingness to take on a certain obligation with the concealed  
22 intent not to actually go through with it that makes it  
23 deceptive.

24 THE COURT: Okay. And there's an allegation in the  
25 indictment that as to the two accounts that Mr. Eisenberg

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1 allegedly used to have the long and short MNGO perpetual  
2 positions, they were not known to the public to be owned by  
3 him. What is that allegation and what is its significance  
4 here? Do you remember the allegation?

5 MR. BURNETT: I remember the allegation. I mean, the  
6 significance is in part that people would not have known,  
7 looking at it, that it was the same person that was—that was  
8 involved in the transaction.

9 THE COURT: Does that matter?

10 MR. BURNETT: It matters to the extent that there  
11 would be a defense at trial or otherwise that this was all  
12 publicly disclosed, not just that there was buying but that the  
13 buying was done by Mr. Eisenberg and it was done for this  
14 particular reason.

15 THE COURT: Well, Mango Markets was certainly aware in  
16 its system that Mr. Eisenberg was on both sides of the  
17 transaction; is that correct?

18 MR. BURNETT: I don't think that's right.

19 THE COURT: You don't think that's right.

20 Okay. Last question: Are MNGO perpetuals mixed  
21 swaps? Is that the government's contention? I know it's not  
22 in the indictment, but given the SEC's position that MNGO is a  
23 security, it would have to be a mixed swap for the CEA to apply  
24 here, right?

25 MR. BURNETT: So we definitely think they qualify as



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1 mixed swaps. We think whether MNGO is a security is not really  
2 something that is decisive to the case because they're either  
3 just regular swaps and MNGO is not a security or they're mixed  
4 swaps both because USDC is a commodity, which brings it into  
5 mixed swaps territory, or because there are these funding rates  
6 that are embedded in the contracts or in the perpetuums, which  
7 are another basis for moving it into the mixed swap.

8 THE COURT: And just teach me, just a 101 question,  
9 but is it permissible for the government in a criminal  
10 prosecution to take a position that is different than a  
11 position that the SEC is taking in active litigation?

12 MR. BURNETT: Yes.

13 THE COURT: Okay. We'll see what Mr. Eisenberg has to  
14 say about that.

15 And those are my questions. If there's anything else  
16 within that field that you'd like to bring to the Court's  
17 attention, I'm happy for you to address it now, but if not,  
18 I'll turn to Mr. Eisenberg and give the government a chance for  
19 a rebuttal at the end.

20 MR. BURNETT: If you don't mind me just checking my  
21 notes quickly.

22 Oh, so there's one last case that I just wanted to  
23 bring the Court's attention to, which I think goes to this  
24 "aimed at Mango Markets" idea that comes up in the defense  
25 brief and was also posed I think in the last question that the

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1 Court asked. And the case there, which we cite in our brief  
2 but not for this point, is *U.S. v. Greenberg*, and that's  
3 835 F.3d 295, which is a Second Circuit case. And that case  
4 held that in a wire fraud context, there's no requirement for a  
5 convergence between the object of the—between the entity  
6 that's being defrauded and the victim that you're trying to get  
7 money from. That's not something that is required. You can  
8 make a fraudulent representation of Party A with the idea of  
9 obtaining money from Victim B, and that is a wire fraud even  
10 though A and B are different people. We think that what  
11 they're interpreting there is the "scheme to defraud" language  
12 from wire fraud, which applies in the same way to the  
13 securities context. We think the case law is good there too.  
14 But we don't think it's right to even think about, like, aimed  
15 at Mango Markets since it's a software platform, but even if  
16 something is aimed at Mango Markets, it doesn't matter, because  
17 you can aim at one to get money from another, and that's a  
18 crime.

19 THE COURT: Okay. Last question: Where is the  
20 \$110 million in cryptocurrency now? I know some of it  
21 allegedly was paid back or returned to at least someone  
22 affiliated with Mango Markets, but help me out with that, if  
23 you know.

24 MR. BURNETT: So I can get into part of it.

25 So part of the money that was taken, there was

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1 basically a negotiation between Mr. Eisenberg and members of  
2 the MNGO DAO where a chunk of the funds was returned, so that  
3 was where some of it is. As to where the rest of it is, I  
4 think it's a combination of—I don't want to get out ahead of  
5 my skis or reveal things that are not appropriately public at  
6 this stage.

7 THE COURT: Okay. That's fair. Thank you for the  
8 argument.

9 And Mr. Klein? All right. Same thing as Mr. Burnett.  
10 Whatever's more comfortable from you. If you want to argue  
11 from the seat, if you want to take the lectern, that's fine for  
12 the Court.

13 MR. KLEIN: Depends on your questions what would be  
14 comfortable.

15 Your Honor, thank you for giving us the opportunity to  
16 talk about the motion to dismiss, and I do appreciate the  
17 issues or the questions you raised in advance because it  
18 allowed us to at least home in on what you might be most  
19 concerned about or focused about.

20 Obviously you just heard a lot from the government,  
21 including a lot of new cases they reeled off that we haven't  
22 had a chance to look at or agree whether their interpretation  
23 of them is accurate, so we may be requesting a chance to do so.

24 But I think I want to again turn back to your  
25 questions or the issues you raised. And you led off with a

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1 question about USDC, and this is an issue we raised in our  
2 reply. And I think what—stepping back from there a little  
3 bit, you know, our client was charged in this case with this  
4 indictment. We looked at this indictment. We went through,  
5 what is he charged with, right? What are they saying here?  
6 What is the focus of the charge? What are the crimes they're  
7 looking at here? And what's this trial going to look like?  
8 And then when you do a motion to dismiss, hey, have they met  
9 the—is this, on its face, valid charges?

10 You started out with those questions with the  
11 government. And I think one of our concerns here is, it's a  
12 little bit like whack-a-mole for us. We're learning new things  
13 today; we're learning how they're going to focus. In their  
14 responses they're like, oh, well, you didn't know that? You  
15 should have looked at our complaint. Oh, you didn't know it  
16 was a swap? Well, you should have been reading between the  
17 lines of these allegations and interpreted this as a swap. And  
18 we don't do those things. And that, you know, strikes me as a  
19 problem overall. And I think that's one thing your questions  
20 sort of identify is sort of a lack of information to our  
21 client, putting him on notice, and it goes to the core of one  
22 of our arguments, which is this void for vagueness argument.  
23 And we think that's a real issue here. And, you know, the  
24 government can get up here and do a lot of explanation now  
25 about what they meant and how it should be interpreted, but I

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1 think that is a really important issue to think about.

2 And I think that's why we presented your Honor with  
3 the *Radley* case, because there's a lot of similarities here.  
4 Of course the underlying facts are different. But big picture,  
5 complex set of tradings happened. Those BP traders, you know,  
6 they did these trades. They went up to the judge—and we put  
7 in the facts in detail here. But at the end of the day, they  
8 did what they were allowed to do on the trading platform.  
9 That's the same thing here. There's no allegation that my  
10 client hacked into this platform, manipulated code in some way;  
11 there's no allegation even that the purchases weren't bona fide  
12 purchases.

13 So if you start with how they lay out this indictment,  
14 the first thing they allege my client did was go on to Mango  
15 and do two bona fide transactions—a long position. And they  
16 concede that essentially because they're saying he wanted that  
17 long position so that ultimately he, in their words, could cash  
18 that money out, borrow it out and not intending to repay it.  
19 And then what they do is they conflate that with this other  
20 markets, these crypto exchanges. And I think one thing to  
21 focus on is those exchanges were not commodities markets.  
22 Those are exchanges. And then they twist the language a little  
23 bit in there and say, oh, he was selling, allegedly, USDC for  
24 MNGO. He was purchasing MNGO. There's no allegation in this  
25 indictment that the USDC price was manipulated. It's all

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1 about—the allegations are all about manipulating the MNGO  
2 price so that the oracle would send information back to the  
3 MNGO protocol so they would make his long position very  
4 valuable. Again, a bona fide position.

5 So what the government didn't talk about today and  
6 what they seem to have completely walked away from, that was in  
7 their opposition, was the idea that these were wash trades.  
8 They weren't. These were bona fide positions they were taking,  
9 under their theory. And those positions, it happened to be  
10 that he was on both sides. Didn't have to be that way.

11 And I think that goes to a number of the points that  
12 you are raising here. We're not seeking a carveout for USDC as  
13 a medium of exchange. USDC wasn't the object of any of this.  
14 There's no—you're not going to be creating a crazy—

15 THE COURT: Just so I understand, you're not taking  
16 the position that under the language of the CEA, USDC does not  
17 qualify as a commodity. You would agree that under the  
18 language of the commodity definition, it fits.

19 MR. KLEIN: I'll agree that their claim is that  
20 there's a futures market for it, and for purposes of this,  
21 therefore, that would qualify as a commodity, yes.

22 THE COURT: Okay. So you're not challenging it, for  
23 purposes of the motion to dismiss.

24 MR. KLEIN: Yes, your Honor.

25 THE COURT: Okay.

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1 MR. KLEIN: So they've made that, and we're not  
2 disputing that at this time, but it was—

3 THE COURT: How do you deal with, going to the  
4 next—I'm going to walk you through the same way I did with the  
5 government.

6 MR. KLEIN: I was worried about that, your Honor.

7 THE COURT: The contract of sale of USDC, Mr. Burnett  
8 points to language that interprets "contract of sale," that  
9 language, very broadly to basically include both sides of the  
10 transaction and not just the purchase; so not just the purchase  
11 of MNGO but also the sale of USDC, if it's a commodity.

12 MR. KLEIN: He's using, allegedly, the USDC to buy the  
13 MNGO. That's the object of this contract, okay? So the object  
14 of this contract is to buy the MNGO. There was never an  
15 intent, under their own theory, to manipulate the price of  
16 USDC, right? And if you accept the government's version of it,  
17 they put up a parade of horrors about this medium of exchange  
18 idea. But here's the other parade of horrors. Everything in  
19 USDC in all these market transactions are now covered by this,  
20 because any time you use USDC in any transaction, you're  
21 immediately sucked into this. That can't be the point of  
22 what's happening here. The focus of this case, which they seem  
23 to be moving around, is the MNGO perpetuals and the MNGO token,  
24 not USDC.

25 THE COURT: Do you have any authority interpreting the

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1 language "contract of sale" in a way that makes clear that the  
2 Court should focus on the object of the transaction, as you put  
3 it, as opposed to just using a textual reading of the broad  
4 definition of "contract of sale"?

5 MR. KLEIN: Your Honor, we cited to one case in our  
6 reply on page 5, coming into page 6, the *Kearney* case. And I  
7 can read the cite to you again, your Honor. It's—

8 THE COURT: If it's in the reply—

9 MR. KLEIN: It's in the reply, yes, your Honor.

10 THE COURT: —we'll find it.

11 MR. KLEIN: And so I think that gets to the core issue  
12 here, you know, on this point, on this first point. And then  
13 your other questions, you know, they sort of all fall in line  
14 with this idea, and again, it's our premise here—sorry. I  
15 just lost your questions, your Honor.

16 One second. Sorry.

17 Oh.

18 THE COURT: Well, so I can—

19 MR. KLEIN: I got it.

20 THE COURT: Yeah, and I think what Mr. Burnett says  
21 is, look, there's this broad definition of "contract of sale,"  
22 and then if you take it one further step back and look at "in  
23 connection with," that phrasing has received a very broad  
24 interpretation both in the securities context and the  
25 commodities context. And so when you put all of that together,



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1 it points away from an interpretation that would require that  
2 there be manipulative conduct specifically with respect to  
3 USDC, as long as there is manipulative conduct in connection  
4 with the transaction, and Mr. Burnett offered an explanation  
5 for how we could think of that here. That's enough to sustain  
6 the charge.

7 MR. KLEIN: And in doing so, he walked away from his  
8 wash trade thing in his opposition, because he needed to.

9 But I think what I would focus on there on the "in  
10 connection with" is, these were bona fide transactions on the  
11 Mango Markets. There was a real bona fide position taken on  
12 long, and a real short. Those are completely legitimate  
13 positions. The government, again, puts those in there at the  
14 start of its allegations of the fraud. Then what happens is,  
15 according to them, on an off market—not a commodities  
16 exchange, on off markets—there are some purchases of MNGO with  
17 USDC. Not only USDC though, to be clear. One of the  
18 exchanges, USDT was used. And that's in the indictment. And  
19 that that affects the price of MNGO. Okay? And what they're  
20 doing is they're conflating these things together. Now, look—

21 THE COURT: Well, I don't think they're conflating  
22 them together. I think they are acknowledging that those were  
23 separate markets or separate exchanges. But I guess in terms  
24 of the legal ramifications of that separate conduct, in  
25 *Phillips*, at least, conduct that occurred in an unregulated

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1 market that then impacted a regulated market could be  
2 considered in determining whether there was a sufficient  
3 allegation of a manipulative device. And so why wouldn't that  
4 apply here? So even if you're right that there are kind of two  
5 separate things going on, given that the government alleges  
6 there was a connection, isn't that enough?

7 MR. KLEIN: Well, one of the issues raised was like,  
8 these are two parties, and Mr. Burnett explained he was  
9 obviously, or in his mind, addressing something analogous to  
10 Judge Liman's decision, which, I don't know the issues, I  
11 haven't read all the briefing, I don't know what was going on  
12 in that case. But I think for us, the core issue is that our  
13 client was—and I'm just harping back to, again, these were  
14 both bona fide transactions on this market. They were  
15 legitimate positions taken out. If people don't like the  
16 results of them, you know, that's something else. But these  
17 were bona fide positions. And I think when you look at that  
18 and you look at—and you've got—and the indictment agrees with  
19 that, and then you look at what *Phillips* is saying, and it  
20 talks about the materiality, my client was taking out his  
21 positions, so there was no, like, to him, what his other self  
22 was doing was material, right? He's on both sides of this  
23 transaction. This happenstance is. Someone could have come in  
24 and been on the other side. That's not the case we have here.  
25 He happens to have been on both sides. And I think when you

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1 look past that, if you say, okay, well, this "in connection  
2 with" is so broad, then my question to your Honor back is, or  
3 our response is, this goes into *Radley* and the void for  
4 vagueness arguments. You know, we had a very convoluted  
5 discussion of the statute and how it applies and how these  
6 different pieces fit together. You know, this is the core of  
7 what the *Radley* court is talking about there. And I think that  
8 would be our focus there would be like, okay, assuming that is  
9 true—and we're not conceding it—you still can do another  
10 layer of analysis, your Honor, and that's what we'd ask you to  
11 do in that part.

12 And when you turn to the last couple questions you  
13 raised, whether the manipulative conduct must be aimed at—

14 THE COURT: Just to test that, I mean, we obviously  
15 have a new context because there just aren't that many cases  
16 arising in the cryptocurrency realm, right? And there  
17 certainly are not very many criminal prosecutions in this area,  
18 so I'll grant you all of that. But I take it that the  
19 allegation is, what's the difference between what is alleged  
20 here—whether it occurred or not is another question, but what  
21 is alleged here—and a classic pump and dump scheme, meaning  
22 that the MNGO perpetuals were pumped up and then Mr. Eisenberg  
23 is alleged to have cashed in on that by engaging in this borrow  
24 and withdraw transaction and then obviously the price of the  
25 MNGO perpetuals craters in the aftermath because he's not

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1 trading anymore. And that's a kind of fact scenario, if you  
2 rip it out of the cryptocurrency context and drop it into  
3 normal securities, that has been the subject of criminal  
4 prosecution for decades.

5 MR. KLEIN: The difference—one of the differences,  
6 your Honor, is, in those pump and dump cases, which I've done  
7 as both a prosecutor and defense lawyer, you're on the same  
8 market, right? You're operating on the same market. You're  
9 trading back and forth, whether it's wash trading, in some way  
10 to pump the price up, right? You're doing a lot of trading  
11 usually on the same market. What's different here is there's  
12 these separate markets that provide this oracle, okay? And you  
13 know, this is a square peg trying to fit into a round hole with  
14 these first two counts, and it's creating problems, which is  
15 why they're doing gymnastics to explain why it should work.  
16 They shouldn't have to do those gymnastics. It should be, in  
17 my opinion, obvious. And that goes, again, back to our  
18 vagueness argument.

19 And there are—well, I will say there are quite a few  
20 cryptocurrency prosecutions, but I defend a lot of people in  
21 this space. So it's becoming more common. I would say there  
22 are fewer commodities prosecutions overall. It's a relatively  
23 rarely charged thing. And that's why you have not that many  
24 decisions to look to, and that's why they're looking to the SEC  
25 or the securities law, 10b-5. But when you look at where they

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1 are charged, you look at *Radley*, again, the same thing. It's a  
2 classic case, at least the government thought in that case, of  
3 sort of manipulating the price, pumping and dumping, traders  
4 benefiting. But the court there stepped back and said, hey,  
5 are they on notice? Is this vague? And I think that's where  
6 we would—again, I hate to keep going back to that same spot,  
7 but I think you can always come back to that same spot when  
8 we're grappling with these issues. And that's one reason also  
9 we raised the rule of lenity, which is, in a criminal  
10 case—it's different than a civil case, different than other  
11 cases—the tie goes to the defendant on these kinds of things.

12 THE COURT: Right. The tie goes to the defendant in  
13 some cases, but a prerequisite is that there is either a  
14 statutory or regulatory ambiguity, and I'm not understanding  
15 you to be arguing that there is actually a statutory or  
16 regulatory ambiguity. I think your argument really is sounding  
17 in void for vagueness and due process principles.

18 MR. KLEIN: You're right, your Honor.

19 THE COURT: And perhaps there's an ambiguity in the  
20 scope of the manipulative device, what that means, and price  
21 artificiality, which I think in *Radley*, there's some  
22 conflation. I think *Radley* is really saying that you can't  
23 have price artificiality unless you have some actual fraud, or  
24 a misstatement that's made; that's what it's really saying.  
25 And it characterizes it as a void for vagueness argument, but I

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1 think it's really just saying that it's not possible that you  
2 could have an artificial price if all you have is bona fide  
3 trading and nothing else.

4 MR. KLEIN: Let me focus on that last point, which  
5 is—

6 THE COURT: Okay.

7 MR. KLEIN: —the gravamen of these cases, or of what  
8 the charges are, the first two charges, the second one was  
9 deception, right? That's the core point. You've got to be  
10 deceiving somebody. You know, trading itself manipulates the  
11 price, right? It's deceptive trading that's illegal. And the  
12 issue here—and you asked the question, the last two questions  
13 about, you know, must be aimed at deceiving investors. Again,  
14 that didn't happen here, based on their own allegations, on the  
15 MNGO perpetuals. It wasn't a deceit. It was a legitimate  
16 position, completely. And then you go, okay, the government  
17 says, well, it's just on the market, just some sort of like, in  
18 general, this, like, nebulous idea. There's still deceit that  
19 has to be there. And that's why you see Judge Cote in the  
20 instruction talk about that. And the government puts it in  
21 their brief. And maybe they didn't realize what they were  
22 doing when they did that because we jumped on it. But Judge  
23 Cote even says that. So it says—let me find it.

24 Judge Cote's instruction specifically includes,  
25 defining manipulation as "intentional or willful conduct

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1 designed to deceive or defraud investors." That's in the  
2 instruction. And that was cited in the opposition, and we  
3 cited it in our reply. And so I think that's a core principle  
4 here. There has to be deceit. And on the Mango Markets, which  
5 is the core of their case, unless they're pivoting somehow  
6 here, that's where they're alleging the deceit happened is on  
7 the Mango Markets, right? And the protocol in that—

8 THE COURT: Well, no, I think Mr. Burnett is saying  
9 they're alleging that it occurred both in the context of the  
10 contracts of sale of USDC for MNGO and in the MNGO perpetuals  
11 market. In both those places there was a manipulative device  
12 in connection with those two transactions. At least that's  
13 what I understood the government to be saying here.

14 MR. KLEIN: The allegations are that it was  
15 manipulated on the off-market cryptocurrency exchange to affect  
16 the oracle, which would affect the perpetual price. This isn't  
17 two separate cases, right? I know your Honor knows this.

18 THE COURT: No, I understand. As I take it, the  
19 government is saying that the key is intent. And you can have  
20 deceit without fraud or a misstatement in the way that *Radley*  
21 says. So *Radley* hasn't been followed, I don't think, by any  
22 other court, and conventionally, while some kind of deception  
23 is required, that deceit can be an omission or it can be, the  
24 government submits, in the form of intent alone. Do you  
25 disagree with that, or are there other authorities that would

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1 support the notion that you would require—you would need  
2 something more?

3 MR. KLEIN: Well, I'd like to look at the authorities  
4 the government was citing today about this issue, which was  
5 just brought up now, so I haven't had a chance to go through  
6 those. But I think we are focused on the idea in our brief  
7 that the deceit has to go to investors or people. At the end  
8 of the day, it has to go down to somebody. And that's—they  
9 can't meet that here.

10 THE COURT: Meaning somebody in the transaction or  
11 just somebody? Because—

12 MR. KLEIN: Investors, somebody in the—

13 THE COURT: In the transaction. Meaning that, you're  
14 saying you can't even get out of the starting gate because as  
15 to that MNGO perpetuals, Mr. Eisenberg was on both sides of  
16 that deal and so—

17 MR. KLEIN: They don't get out of that starting gate,  
18 your Honor.

19 THE COURT: For that reason. Because he was on both  
20 sides of the deal. Whether or not you might have a wire fraud  
21 count because of his interactions with Mango Markets—that's  
22 Count Three—that's another story, but as to Count One, at  
23 least, you are limited to a manipulative device employed with  
24 respect to investors in the transactions that are listed in the  
25 statute.



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1 MR. KLEIN: His transactions on Mango Markets, as  
2 alleged, were designed to—they're bona fide positions,  
3 designed to increase, and then he cashed them out. So I  
4 think—I want to think about your question, make sure I totally  
5 understand it, but I think the answer is yes, your Honor.  
6 There was no misrepresentation to anybody on the Mango Markets  
7 protocol. Those were legitimate positions. And the fact—you  
8 know, they make some big hullabaloo about, he didn't identify  
9 himself. Mango Markets protocol didn't require anybody to  
10 identify themselves. There was no protocol. You didn't have  
11 to sign or put your name anywhere. They're never going to put  
12 that into evidence. There's no requirement.

13 THE COURT: Right. But you would agree that at this  
14 stage I can't really consider those extrinsic facts, given the  
15 very low standard of review of indictments; meaning that you're  
16 going to have the chance to make those arguments on a Rule 29  
17 motion, if appropriate, at the time of trial or, if it's  
18 denied, after trial.

19 MR. KLEIN: Yes.

20 THE COURT: But the evidence in the record—

21 MR. KLEIN: I agree that you have to look at the  
22 indictment and read it, interpret it, certainly. But I'm  
23 asking you to do that in this case, your Honor. To be clear,  
24 we are asking you to do that. We want you to do that because  
25 there are a lot of deficiencies here. And those are the ones

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1 we've been pointing out.

2 And I think I've exhausted my points.

3 THE COURT: Okay. And how much time would you want to  
4 respond to the authorities that were cited here today? I want  
5 to give you a full opportunity to respond to them. I do want  
6 to get the parties decisions on these motions as soon as I can  
7 because I know that they've been pending for a while. Although  
8 they haven't been pending in front of me for a long time, but,  
9 you know, I take on the burden of the entire court, so—

10 MR. KLEIN: We appreciate you trying to expedite the  
11 decision here, your Honor. May I have one moment to talk to my  
12 co-counsel.

13 THE COURT: Absolutely.

14 MR. KLEIN: Your Honor, Monday? Is that okay?

15 THE COURT: That works. Okay. So Monday, we'll have  
16 a response to the new authorities cited by the government here  
17 today.

18 One last question. So I asked you this question about  
19 statutory or regulatory ambiguity, which I think is required  
20 for there to be a trigger on either major questions doctrine  
21 and *Chevron*, that's invoked in the briefing, or the rule of  
22 lenity. So is there any statutory or regulatory ambiguity that  
23 you are relying on here?

24 MR. KLEIN: Well, we think there is, your Honor. We  
25 think it's so broadly drawn that there is some ambiguity here.

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1 THE COURT: Where is that ambiguity?

2 MR. KLEIN: Which statute are we focusing on now?

3 THE COURT: As I understand it, there are two places  
4 where you're invoking the doctrine, both in terms of the  
5 definition of "swap" and in the definition of "contract of sale  
6 of a commodity."

7 MR. KLEIN: I would think some of the ambiguity lies,  
8 because now the government is trying to grab a hold of it, in  
9 the "contract of sale of any," when actually the underlying  
10 language uses the medium of exchange to purchase something, so  
11 I think that has some ambiguity there. Let me think about  
12 that—

13 THE COURT: The ambiguity would be that—well, as to  
14 the medium of exchange point, the government's response is that  
15 there are actually explicit carveouts for things that are  
16 mediums of exchange, where Congress believed that those should  
17 be carved out of a definition and so that demonstrates that the  
18 definition of "commodity" is actually clear, that it covers  
19 what it covers. But I take it that your argument is, as to  
20 "contract of sale of a commodity," that doesn't answer your  
21 question of whether you look at the object of that contract of  
22 sale as opposed to just looking at both sides of it no matter  
23 what. So if you have a situation where there's USDC or  
24 anything, if it's used as a medium of exchange and the real  
25 object of the purchase or sale is the thing at the other end of

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1 the transaction, that's what you need to look at when you're  
2 then piecing together the remaining elements of the statute.

3 MR. KLEIN: Yes, your Honor.

4 THE COURT: Okay. Understood. Thank you.

5 Mr. Burnett, any response?

6 MR. BURNETT: Just a few really quick points.

7 THE COURT: Of course.

8 MR. BURNETT: So first, you asked the question about  
9 case law on this "contract of sale" point. I realize I  
10 forgot—I can't remember if this is in our brief or not, but  
11 *CFTC v. McDonnell*, which is a Judge Weinstein opinion, 287  
12 F.Supp.3d 213, explains that the antifraud provisions of the  
13 CEA apply to spot cryptocurrency transactions, which we think  
14 is kind of straightforward, answers this question. So that's  
15 that.

16 Second, on the point about *LEK Securities*—this is the  
17 Judge Cote instruction—it's right that that case uses the word  
18 "investors," as do other manipulation cases in the circuit. I  
19 think the point there is they're using the word "investors"  
20 because that's who was the one who was being deceived by the  
21 manipulation in those cases. If it was someone who was doing a  
22 pump and dump scheme and taking out a loan based on the pumped  
23 value of their shares as opposed to selling their pumped shares  
24 back into the market, the principle is the same, that someone  
25 who's in the market for these securities, be it as collateral

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1 or as an investment, is the one who's being deceived. So the  
2 fact that they say "investors" in there is not holding that  
3 manipulation claims, unlike all other claims under 10b-5, are  
4 limited to deception of investors. It's just conforming the  
5 facts to the instruction.

6 The third point is this, like, kind of transaction  
7 limitation to the swap question. So there's this point about,  
8 well, because Mr. Eisenberg was on both sides, therefore, no  
9 one else can bring this. I think we've answered that. There's  
10 the regulatory guidance on pendency and there's this collateral  
11 point we've made, but I also add that there's a distinction  
12 here that's important between government actions versus private  
13 actions, in the sense that there is a separate section of the  
14 CEA—7 U.S.C. Section 25—that imposes separate limitations on  
15 when someone could bring a private right of action under the  
16 CEA, which does implicate some requirements about needing to be  
17 a purchaser or seller or—they're more complicated than that,  
18 but basically you shouldn't be importing those private right of  
19 action provisions into a government—into a government  
20 enforcement action because they're separate requirements. If  
21 Congress wanted to impose those, it could have imposed them on  
22 the government. It didn't.

23 Then the last point is more for clarity of the record  
24 and preserving our position here. Just because I didn't talk  
25 about the wash trade element, obviously doesn't mean we are

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1 agreeing that there was not a wash trade or that these were  
2 bona fide transactions, but this is not a motion to dismiss  
3 argument. Whether they're bona fide or not is a question the  
4 jury can decide.

5 THE COURT: Okay. But these are not like conventional  
6 wash trades.

7 MR. BURNETT: In the sense that he's on the same side  
8 of both transactions.

9 THE COURT: But in terms of what wash trades are  
10 usually used for.

11 MR. BURNETT: It's used for a different thing, but it  
12 was not bona fide in the sense that he was not genuinely trying  
13 to make an investment in MNGO, because if you hold the short  
14 and the long position, your net on MNGO is 0. If it goes up on  
15 one, it goes down on the other. It's only being used to do  
16 this scheme, stealing the money off the platform.

17 THE COURT: Okay. Look, Mr. Eisenberg's argument is,  
18 we just spent an hour and a half with a very complicated  
19 statutory scheme in a novel factual context, multiple different  
20 markets. How does this comport with fair notice and due  
21 process principles, as outlined in *Lanier* and other cases, to  
22 just drop these charges on Mr. Eisenberg? I mean, let's take a  
23 step back. You have the SEC, the CFTC, and the government  
24 going after Mr. Eisenberg based on what the defense says were  
25 real trades, with no misrepresentations of any kind. You know,

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1 flag for the moment the borrow and withdraw transaction. But  
2 how does that comport with just normal void for vagueness and  
3 fairness principles that the Supreme Court has outlined?

4 MR. BURNETT: Of course. A few things.

5 So first, the fact that they are real trades, the  
6 Second Circuit has rejected over and over and over again as a  
7 defense to these charges. The fact that the defense bar  
8 continues to deny that real trades can be manipulation doesn't  
9 make it void for vagueness. There was a conviction a couple  
10 weeks ago on exactly this same—

11 THE COURT: Well, the *Radley* court recognizes that but  
12 said, look, if you have real trades, that could be the subject  
13 of a prosecution, but you need to have some fraud or an  
14 affirmative misstatement in order to satisfy the constitutional  
15 requirements here, given the novelty of the framework and the  
16 complicated statutory scheme, etc.

17 MR. BURNETT: And the Second Circuit has rejected  
18 that. And, frankly, the Fifth Circuit refused to adopt it too.  
19 It didn't decide it one way or the other. But there's one  
20 district court in the country who's reached that decision. And  
21 the Second Circuit has consistently rejected it. And a court  
22 in this district a couple weeks ago rejected it. That's one  
23 point.

24 Second, I think the facts at trial will belie this  
25 idea that Mr. Eisenberg was surprised by the prosecution. We

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1 think there is evidence from both before he did this, including  
2 him using fake identity to set up one of these accounts, as  
3 well as his flight to Israel and certain other things we have  
4 in text messages and other pieces of evidence, that will show  
5 Mr. Eisenberg was quite aware that he was breaking the law.  
6 And this goes also on Count One to the fact that we need to  
7 show willfulness, which means we need to prove that  
8 Mr. Eisenberg knew that his conduct was wrong, which has  
9 traditionally been held as a reason why not to dismiss a case  
10 on void for vagueness grounds because if it was really the case  
11 that the defendant had no idea what he was doing was wrong, we  
12 wouldn't be able to prove willfulness and we just wouldn't have  
13 established a crime. So I think that's another angle to it.

14 And finally, while there are—this is certainly a more  
15 complicated statute than, like, the gun possession statute or  
16 other ones, and there are technical elements and all that, but  
17 at the end of the day, Mr. Eisenberg artificially inflated the  
18 price of an asset, used that asset as collateral for a loan  
19 that he knew he had no intention of ever being able to pay off  
20 or trying to pay off, and ran off with the money. This is  
21 classic heartland pump and dump style scheme. It's in a new  
22 context. A DeFi makes it a little more complicated. We don't  
23 think this is a novel application of the statute.

24 THE COURT: I understand. And I take it that, using  
25 the language of *Lanier*, since the inquiry focuses on



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1 Mr. Eisenberg's conduct and that is not fully outlined in the  
2 indictment, that Mr. Eisenberg can make all these arguments on  
3 a Rule 29 motion and down the line when there's a full factual  
4 record, but it's hard to address that in a way that would be  
5 favorable for Mr. Eisenberg on the face of the indictment  
6 alone, given where we started, which is the limited review on a  
7 motion to dismiss in the first place.

8 MR. BURNETT: Yes, your Honor.

9 THE COURT: Okay. And then the only thing I'll say  
10 is, when you were describing the conduct, you added in the word  
11 "artificiality," and I think that's the source of the  
12 defendant's argument is that, what does that mean, like  
13 artificial versus real?

14 MR. BURNETT: I think that's right. But I think. Oh,  
15 sorry. I didn't mean to interrupt.

16 THE COURT: No. Go ahead.

17 MR. BURNETT: The way that will bear out is one of—on  
18 Count Two, we need to prove that he specifically intended to  
19 create an artificial price. So if he didn't intend that, he  
20 had no idea what artificial was, then the jury will acquit him.

21 THE COURT: Okay. Fair enough.

22 And Mr. Klein, just one additional question. On the  
23 mixed swap question, what is your position there? So I  
24 understand that there's a discussion in your brief that says  
25 the SEC is referring to MNGO as a security, and the suggestion

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1 in your briefing is that for that reason, it may be that the  
2 swaps are not covered by the CEA. But given that there is a  
3 provision in the CEA that says that it covers mixed swaps,  
4 where there's a security and then something else, including a  
5 commodity or another interest, wouldn't that fall into that  
6 definition regardless of whether MNGO was a security?

7 MR. KLEIN: Well, your Honor, I think we're missing  
8 the "mixed" part there. There's not a commodity there. We're  
9 saying it would be a security swap. That's what we said in our  
10 brief.

11 THE COURT: Right. But the swap is based on the value  
12 of MNGO and then USDC, right? And as we've discussed, for  
13 purposes of the motion to dismiss, at least, you're not  
14 disputing that USDC falls into the technical definition of  
15 "commodity." So under that understanding, that would be a  
16 mixed swap that would fall under the ambit of the CEA.

17 MR. KLEIN: What I would say there, your Honor, is  
18 they don't have the USDC as a commodity in their indictment, so  
19 it's not a mixed swap in their indictment. So they're bound by  
20 the corners of their indictment. And we hear a lot today, new  
21 facts, new allegations that they make it sound like there's a  
22 lot more here. So I was just saying that in their papers they  
23 said there's a futures market, and I'm not—

24 THE COURT: Are you challenging the general  
25 proposition that, at least for purposes of this motion to

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1 dismiss, that the MNGO perpetuals would count as mixed swaps?

2 MR. KLEIN: I would say they don't have the  
3 allegations to meet that definition in their indictment.

4 THE COURT: Just outside of whether they've alleged it  
5 or not. Because I think the government's position is they  
6 didn't have to allege it, given the principles that govern  
7 review of a motion to dismiss an indictment. But putting that  
8 to the side, are you—

9 MR. KLEIN: Well, I disagree with that principle.

10 THE COURT: No, I understand the dispute. And you put  
11 that in your papers.

12 MR. KLEIN: Okay.

13 THE COURT: I'm just trying to understand whether  
14 there is a substantive argument you can make as to why the MNGO  
15 perpetuals would not qualify as mixed swaps so that the Court  
16 can think about that. Whether or not I'm able to get to it,  
17 given the standards governing the motion to dismiss, that's a  
18 separate issue, but I want to just know if there's a  
19 substantive reason. For instance: Yeah, it would cover it  
20 under certain circumstances but for this reason, it's not a  
21 mixed swap in this case and you have to look at this statutory  
22 provision. Something like that.

23 MR. KLEIN: Your Honor, I'd like to—can we include  
24 that in what we file on Monday?

25 THE COURT: Yes, you can include that in what you file

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1 on Monday.

2 MR. KLEIN: Thank you.

3 THE COURT: Okay. Anything else from either side?

4 All right. I really appreciate the argument today,  
5 and the Court will endeavor to get you a decision on both  
6 motions by the conclusion of next week. I will await  
7 Mr. Eisenberg's submission on Monday relating to the issues  
8 that we discussed, the new cases and the question of the  
9 perpetuals as mixed swaps.

10 Thank you very much. We are adjourned.

11 ALL COUNSEL: Thank you.

12 o0o